(2)

No. 03-1566

In the Supreme Court of the United States

FRANCIS A. ORFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
MARIA IIZUKA
TODD S. AAGAARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioners, irrigators who purchase water from the Westlands Water District in California, sued the United States and federal officials for money damages, alleging that the United States breached its water service contract with Westlands. The question presented is:

Whether the court of appeals correctly determined that petitioners could not sue the United States for an alleged breach of Westlands' contract with the United States because petitioners are not intended third-party beneficiaries of that contract.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Barcellos & Wolfsen, Inc. v. *Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993)	3
Busby Sch. of N. Cheyenne Tribe v. *United States*, 8 Cl. Ct. 596 (1985)	10, 11
Carlow v. *United States*, 40 Fed. Cl. 773 (1998)	10
Department of Ecology v. *United States Bureau of Reclamation*, 827 P.2d 275 (Wash. 1992)	10
Dewakuku v. *Martinez*, 271 F.3d 1031 (Fed. Cir. 2001)	8, 9
General Dynamics v. *United States*, 47 Fed. Cl. 514 (2000)	11
Henderson County Drainage Dist. v. *United States*, 53 Fed. Cl. 48 (2002)	10
H.F. Allen Orchards v. *United States*, 749 F.2d 1571 (Fed. Cir. 1984), cert. denied, 474 U.S. 818 (1985)	9
Klamath Water Users Protective Ass'n v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000)	7, 8, 9
Montana v. *United States*, 124 F.3d 1269 (Fed. Cir. 1997)	7
Roedler v. *Department of Energy*, 255 F.3d 1347 (Fed. Cir.), cert. denied, 534 U.S. 1056 (2001)	8, 9
Schuerman v. *United States*, 30 Fed. Cl. 420 (1994)	10

Cases—Continued:

	Page
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)	2
Westlands Water Dist. v. *Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993)	4, 11
Wyoming v. *United States*, 933 F. Supp. 1030 (D. Wyo. 1996)	11, 12

Constitution and statutes:

U.S. Const.:	
Amend. V	4
Due Process Clause	4
Just Clause	4
Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115	2
Endangered Species Act, 16 U.S.C. 1531 *et seq.*	4
River and Harbor Act of 1937, ch. 832, § 2, 50 Stat. 850	2
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*	4
28 U.S.C. 1346	12
28 U.S.C. 1491	12
43 U.S.C. 390uu	5, 6, 8, 11
43 U.S.C. 423(e)	8

Miscellaneous:

55 Fed. Reg. 46,515 (1990)	3
58 Fed. Reg. 12,854 (1993)	3
Restatement (Second) of Contracts (1979)	7

In the Supreme Court of the United States

No. 03-1566

FRANCIS A. ORFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 358 F.3d 1137. The opinion and order of the district court on the motion for reconsideration (Pet. App. 23a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2004. The petition for a writ of certiorari was filed on May 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In recent years, the federal government has reduced the amount of irrigation water that it delivers from some portions of the California Central Valley Project

in order to comply with congressional mandates to mitigate the Project's impact on endangered and threatened fish and wildlife. Petitioners, a group of irrigators who purchase Central Valley Project water from Westlands Water District (Westlands), filed suit against the United States and federal officials, alleging that the reduced water deliveries violate various rights they claim to hold through a 1963 contract between the United States and Westlands. Petitioners sought money damages for those alleged deprivations. The district court held that petitioners could not sue for violation of the 1963 contract because they are neither parties to, nor intended third-party beneficiaries of, the contract. Pet. App. 23a-46a. The court of appeals affirmed in relevant part, holding that petitioners are not intended third-party beneficiaries of the 1963 contract. *Id.* at 9a-14a.

1. The Central Valley Project is a federal reclamation project designed "to re-engineer [the] natural water distribution" of California's Central Valley. See generally *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 728 (1950). The Project consists of a collection of dams, reservoirs, hydropower generating stations, canals, electric transmission lines, and other infrastructure used to accomplish the Project's purposes. See *id.* at 733. Congress initially authorized funds for the Project under the Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115. Congress reauthorized the Project in 1937 as a federal reclamation project under the River and Harbor Act of 1937 (1937 Act), ch. 832, § 2, 50 Stat. 850, and has since amended or supplemented the 1937 Act many times.

In 1963, the United States, acting pursuant to federal reclamation statutes, entered into a long-term water service contract (1963 contract) with Westlands. Pet.

App. 3a; Appellants' Excerpts of Record (AER) 136-181. At the time, the United States was in the process of constructing the San Luis Unit of the Central Valley Project. See AER 138. Under the 1963 contract, the United States agreed to furnish water to Westlands from the San Luis Unit, and Westlands agreed to pay for such water. The contract specifies maximum quantities of water to be sold annually. See *id.* at 143-146.

2. In February 1993, the Bureau of Reclamation (Bureau) announced its initial allocation of Central Valley Project water for 1993. See Pet. App. 3a. Under the allocation, agricultural contractors south of the Sacramento-San Joaquin Delta, such as Westlands, were to receive only 50% of their maximum contractual supply of Central Valley Project water. Contractors north of the Delta were to receive 100% of their supply, as were "exchange contractors" south of the Delta. See *ibid.*[1]

[1] Contractors south of the Delta depend on pumps to deliver their water. The operation of these pumps can harm fish. Following the listing of winter-run chinook salmon and delta smelt as threatened species, 58 Fed. Reg. 12,854 (1993) (delta smelt); 55 Fed. Reg. 46,515 (1990) (chinook salmon), the Bureau imposed operating restrictions on the pumps to reduce losses to those species in accordance with findings made by the National Marine Fisheries Service and the Fish and Wildlife Service. Those operating restrictions, in turn, reduced the amount of water that the Bureau could deliver south of the Delta. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717, 720-721 (E.D. Cal. 1993).

The Bureau does not, however, reduce water deliveries to exchange contractors, even though they are south of the Delta, because exchange contractors present a special situation. When the Bureau began building the Central Valley Project, it entered into contracts with holders of senior downstream water rights that were affected by the Project. Under those "exchange contracts," the holders of downstream water rights agreed not to exercise their rights in exchange for a commitment by the Bureau to provide "substitute water" from the Central Valley Project. The term "exchange contractors" refers to the parties to the exchange contracts and their successors in interest. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993).

In May 1993, Westlands filed this action challenging the Bureau's reductions in deliveries of water to Westlands. See Pet. App. 3a-4a, 25a; Westlands Excerpts of Record (WER) 1-18. Westlands' complaint alleged that the defendants had violated the Due Process and Just Compensation Clauses of the United States Constitution, U.S. Const. Amend. V; the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; and the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See WER 10-15. Westlands requested injunctive relief and money damages. See *id.* at 16.

Westlands, joined by three other water districts, later filed a first amended complaint. The amended complaint set forth claims that were virtually identical to those alleged in Westlands' original complaint. A number of other persons and entities subsequently intervened, some as plaintiffs and some as defendants. As a result of intervention, the plaintiffs consisted essentially of two groups: (1) water districts, water agencies, and irrigation districts; and (2) petitioners, who are individual landowners and water users who purchase water from Westlands. The defendants consisted of federal agencies and a variety of fishing and wildlife-protection groups. See Pet. App. 4a, 25a.

3. Over time, various negotiations and agreements among the State of California, the federal government, and urban, agricultural, and environmental interests resolved many of the concerns that had led the water districts to file suit. Accordingly, in September 1995,

the water districts dismissed their complaint, leaving only petitioners' complaints, and the case proceeded on petitioners' claims. See Pet. App. 4a, 25a. Among their numerous claims, petitioners asserted the cause of action at issue here, which alleges that the United States is liable to petitioners for breach of the federal government's contract with Westlands. See WER 40-41. Petitioners predicated that claim on 43 U.S.C. 390uu, which waives the United States' sovereign immunity from "any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." See Pet. App. 4a-5a, 26a, 47a. Petitioners contended that Section 390uu not only waives the United States' sovereign immunity to suit by the contracting party, Westlands, but also subjects the United States to the individual farmers' claims for money damages. See *id.* at 4a-5a, 26a; WER 34.

The district court denied the parties' cross-motions for summary judgment. Each of the parties sought reconsideration. The federal government contended, among other things, that 43 U.S.C. 390uu's waiver of sovereign immunity does not allow petitioners to sue under Westlands' contract because petitioners are not intended third-party beneficiaries of the contract. On reconsideration, the district court agreed, holding that, although petitioners are third-party beneficiaries of Westlands' 1963 contract, they are only incidental beneficiaries (as opposed to intended beneficiaries) and therefore have no right to enforce the terms of the contract against the United States. Pet. App. 27a-34a. The district court ultimately ruled in favor of the federal government on all of petitioners' claims and

entered final judgment against petitioners. *Id.* at 21a-22a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-20a. Although petitioners raised and the court ruled on numerous issues, only one is relevant here. The court of appeals agreed with the district court's determination that sovereign immunity bars petitioners' claims under Westlands' contract. *Id.* at 5a-17a. It concluded that the waiver of sovereign immunity in 43 U.S.C. 390uu does not extend to petitioners' claims because petitioners are not intended third-party beneficiaries of Westlands' water service contract with the United States. The court of appeals vacated the district court judgment to the extent that it addressed the merits of petitioners' claims. Pet. App. 17a-20a.

ARGUMENT

The court of appeals correctly concluded that petitioners are not intended third-party beneficiaries of Westlands Water District's water service contract with the United States. That decision does not conflict with any decision of this Court or any other court of appeals. The only two courts of appeals to address the issue—the Ninth Circuit and the Federal Circuit—apply the same legal principles in determining third-party-beneficiary status. Any difference in outcome among particular cases in those courts reflects differences in the particular facts and does not present any issue warranting this Court's review.

1. In determining that petitioners do not have standing to sue on Westlands' contract with the United States, the court of appeals correctly relied on general principles of contract law. See Pet. App. 9a-17a. The court had previously recited those principles in

Klamath Water Users Protective Ass'n v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000). The court explained in *Klamath* that, "[b]efore a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract." *Id.* at 1210. An incidental third-party beneficiary, by contrast, lacks standing to sue on the contract. *Id.* at 1211. To distinguish intended from incidental third-party beneficiaries, courts look to whether the parties to the contract exhibited an intent to confer contractual rights on the third party. *Ibid.* (citing Restatement (Second) of Contracts § 302 (1979), and *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)). See Pet. App. 9a-11a.

Applying those principles to petitioners' claim, the court of appeals analyzed Westlands' water service contract with the United States and determined that, although the contract contemplated that irrigators such as petitioners would benefit from the contract, the contract did not express an intent, explicitly or implicitly, to confer any contractual rights on the irrigators. Pet. App. 11a-14a. As the court of appeals explained, neither Article 11(b) of the Westlands 1963 contract, which addresses water supply shortages, nor Article 15 of that contract, which addresses user payment and assessment obligations, manifests any intent to grant irrigators the right to enforce the contract. *Ibid.*

The court of appeals' conclusion is especially compelling in light of the structure of federal reclamation law, which directs the Bureau to establish contractual relationships with the irrigation districts with whom it executes contracts, and not with the end users who in turn purchase water from the districts. The relevant provision of federal reclamation law expressly requires

the Bureau to contract with "an irrigation district or irrigation districts organized under State law," rather than with the end users of the water. 43 U.S.C. 423e. Further, reclamation law specifically designates which parties have standing to sue the government for claims arising out of reclamation contracts, limiting the United States' waiver of sovereign immunity to "contracting entities." 43 U.S.C. 390uu.

Petitioners' contrary view, which rests on debatable policy arguments rather than contractual language or statutory text, is without merit. Petitioners contend (Pet. 23) that irrigators should be able to sue to enforce an irrigation district's contract because the irrigation district may not act with sufficient vigor to protect the interests of the irrigators to whom it delivers water. Petitioners' concern that the irrigation district may fail to fulfill its duties does not, however, justify allowing the irrigators to sue the United States. Instead, if an irrigation district were to neglect its obligations to its members, the irrigators' proper remedy would be to take action against the district.

2. Petitioners contend (Pet. 16-22) that the court of appeals' decision in this case conflicts with the Federal Circuit's decisions respecting third-party beneficiaries. The Federal Circuit, however, applies the same well-established contract law principles that the court of appeals applied in this case to determine whether a plaintiff is an intended third-party beneficiary of a contract. Both courts assess whether the parties to a contract have expressed a clear intent to benefit the third-party plaintiff. See, *e.g.*, Pet. App. 10a; *Dewakuku* v. *Martinez*, 271 F.3d 1031, 1041 (Fed. Cir. 2001); *Roedler* v. *Department of Energy*, 255 F.3d 1347, 1352 (Fed. Cir.), cert. denied, 534 U.S. 1056 (2001); *Klamath*, 204 F.3d at 1210-1211. In making that assessment, both

courts look primarily to the language of the contract to determine the parties' intent. Pet. App. 11a-14a; *Dewakuku*, 271 F.3d at 1041; *Roedler*, 255 F.3d at 1352; *Klamath*, 204 F.3d at 1211.

Petitioners are mistaken in asserting (Pet. 16-19) that the court of appeals' decision in this case specifically conflicts with the Federal Circuit's decision in *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571 (1984), cert. denied, 474 U.S. 818 (1985). Contrary to petitioners' characterizations, the court of appeals in this case did not hold categorically that "farmers in a reclamation project are 'incidental' rather than 'intended' third-party beneficiaries of a service or repayment contract between their district and the Bureau." Pet. 21. Rather, the court examined the specific provisions of Westlands' water service contract with the United States and concluded that the particular contract did not confer any contractual rights on petitioners. Pet. App. 11a-14a. Similarly, the Federal Circuit's brief discussion of third-party beneficiary status in *Allen Orchards* did not categorically hold that all irrigators using water from a reclamation project are intended third-party beneficiaries of reclamation contracts. See 749 F.2d at 1576. In fact, *Allen Orchards* did not involve a reclamation contract at all. Instead, the irrigators in that case claimed to be intended third-party beneficiaries of a "consent decree and subsequent alleged implied contracts." *Ibid.* The two cases simply involve different factual circumstances that have led to different outcomes.[2]

[2] The Federal Circuit's decision in *Allen Orchards* has limited value as a precedent in any event because the court relied on a conclusion respecting state law that is incorrect. In ruling that the irrigators were intended third-party beneficiaries, the Federal Circuit assumed that the irrigators had a property right under Washington state law to the water they put to beneficial use. 749 F.2d at 1576. Since that time, the Washington Supreme Court has held that, under Washington law, recipients of federal reclamation water do not have an appropriative right to the water they use. See *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 281 (Wash. 1992).

Petitioners cite (Pet. 18-19) several lower court cases from within the Federal Circuit to bolster their claim of a conflict. Those decisions, however, are consistent with the court of appeals' decision in this case. In each case, the court applied the same principles that the court of appeals employed in this case. See *Henderson County Drainage Dist.* v. *United States*, 53 Fed. Cl. 48, 52 (2002) ("The test for determining third-party beneficiary status is whether or not the contract reflects the express or implied intention of the parties to benefit the party claiming third-party beneficiary status.") (citations and internal quotation marks omitted); *Carlow* v. *United States*, 40 Fed. Cl. 773, 781 (1998) ("In order to show a contractual relationship with the defendant as a third-party beneficiary of a contract, the plaintiffs must demonstrate that the parties expressly or impliedly intended that the contract in question specifically benefit the party claiming third-party beneficiary status.") (citations and internal quotation marks omitted); *Schuerman* v. *United States*, 30 Fed. Cl. 420, 428 (1994) (precedent "requires a showing that the contract in question was intended to specifically benefit the party claiming third-party beneficiary status"); *Busby Sch. of N. Cheyenne Tribe* v. *United States*, 8 Cl. Ct. 596, 602 (1985) ("The test generally utilized in this regard is for

plaintiffs to show that they were the intended beneficiaries of the contracts in question.").[3]

In short, there is no conflict between Ninth Circuit and Federal Circuit on the principles for determining third-party beneficiary status. Petitioners are not challenging the court of appeals' use of well-established contract principles regarding third-party beneficiaries, but rather the court of appeals' case-specific determination that petitioners are not intended third-party beneficiaries of their irrigation district's water service contract. Petitioners' objections to the court of appeals' application of properly stated rules of law to particular facts does not warrant further review.[4]

---

[3] Petitioners also cite (Pet. 18-19) *General Dynamics* v. *United States*, 47 Fed. Cl. 514, 531-532 (2000), but that case involved a determination of whether the plaintiffs were real parties in interest and did not address whether the plaintiffs were intended third-party beneficiaries to a contract. In any event, the contract at issue in *General Dynamics* was clearly intended to confer contractual rights on the plaintiff. See *id.* at 529-530. The government offered the contract to the plaintiff, rather than to its subsidiary, and the contract identified the plaintiff as the contracting entity. *Ibid.*

[4] Even if petitioners could establish that they were intended third-party beneficiaries of Westlands' contract with the United States, and therefore could sue to enforce the contract, Section U.S.C. 390uu would not give the district court jurisdiction over their suit for money damages against the United States. Pet. 14. Section 390uu waives the United States' sovereign immunity for suits for declaratory relief, but not for money damages suits. 43 U.S.C. 390uu (waiver limited to "any suit to adjudicate, confirm, validate, or decree" contractual rights under a reclamation contract); see *Firebaugh*, 10 F.3d at 674 ("We conclude that this statutory provision waives sovereign immunity in this case, where appellants are seeking injunctive and declaratory relief under [reclamation] contracts."); *Wyoming* v. *United States*, 933 F. Supp. 1030, 1038 (D. Wyo. 1996) ("This statute waives the United States' sovereign immunity from a declaratory relief action brought by a party to a contract with the United States to establish the party's rights under that contract."). Except where Congress has specifically provided otherwise, jurisdiction over suits for money damages greater than $10,000 lies only in the Court of Federal Claims. 28 U.S.C. 1346, 1491.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
MARIA IIZUKA
TODD S. AAGAARD
Attorneys

JULY 2004